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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

EDWARD L. MORRIS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

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22 pp

QUESTION PRESENTED

"No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offense." James Madison; 5th Amendment to the Constitution of the United States.

If there is "ONE SCHEME TO DEFRAUD" and one "mailing" of the "SCHEME TO DEFRAUD" to 800+ separate individuals are there 800 separate cases which are immune to the constitutional prohibition of "one trial for the same offense"?

The Petitioner respectfully suggest the answer is NO.

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ON PETITION FOR WRIT OF CERTIORI
TO THE SUPREME COURT OF THE
UNITED STATES

Edward L. Morris respectfully petitions for a writ of certiori to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 65 F.3d 82. It appears in the Appendix at A-1.

The United States District Court for the Eastern District of Missouri adopted the Report and Recommendation of the U.S. Magistrate Judge and dismissed Steven M. Gardner's and Edward L. Morris' motions to dismiss on Double Jeopardy grounds.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this petition for certiori is the Fifth Amendment.

STATEMENT OF THE CASE

The Petitioner, Edward L. Morris, along with Steven M. Gardner, was convicted in the United States District Court of the Southern District of Illinois on November 10, 1993 of two counts of mail fraud in violation of 18 U.S.C. 1341 and one count of wire fraud in violation of 18 U.S.C. 1343.

The Petitioner, Steven M. Gardner and one Joseph Mason are also under an indictment in the Eastern District of Missouri which was returned in that District on the same day, November 19, 1992, as was the Illinois indictment upon which the above conviction was bottomed. The Missouri indictment charges each of the three Defendants with one count of conspiracy in violation of 18 U.S.C. 371, three counts of false entries in the books of a federally insured lending institutuion in violation of 18 U.S.C. 1006, one count of a false statement to a department or agency of the United States in violation of 18 U.S.C. 1001, and thirteen counts of mail fraud in violation of 18 U.S.C. 1341.

The Petitioner moved to dismiss the Missouri indictment on the grounds of Double Jeopardy in the District Court. The District Court denied the Motion. The Eighth Circuit Court of Appeals, with Circuit Judge Wollman writing, affirmed by written opinion dated August 28, 1995. The opinion is affixed hereto as A-1 for the convenience of the reader.

ARGUMENT

The Eighth Circuit says at page 4 of the Slip Opinion:

> "Gardner and Morris both contend that the alleged scheme is one continuous course of conduct for which they cannot be subjected to multiple prosectuions. The Illinois counts deal with two specfic instances of mail fraud on January 18 and February 7-8, 1988, as well as one count of various wire fraud offenses from January 14 through the end of February 1988. The Misouri counts allege a conspiracy that lasted from September 26, 1987 through July 26, 1988. The specific counts of false entries, mail fraud and false statement in the Missouri indictment are also alleged to have taken place at various times within this time frame. There can be no doubt that the charged offenses arise from the same set of circumstances and are predicated on the same transactions theme, but. . ." (Emphasis Added)

At page 6 of the Slip Opinion, Judge Wollman reasons that although the scheme to defraud is identical in Missouri and Illinois, each separate mailing is a separate offense and thus not subject to the Constitutional stricture. With all due respect to the Circuit, the common sense virtues of due process are not met by saying that the frequently "presumed

act" of mailing, clothe's the same scheme to defraud in each case of mailing with constitutional immunity from the Double Jeopardy bar.

The Circuit's decision is in conflict with this Court's modern day decisions in Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) and U.S. v. Halper, 109 S.Ct. 1892 (1989) as well as its more historical decisions in In re: Nielsen, 9 S.Ct. 672 (1889); and In re: Snow, 7 S.Ct. 556 (1887). The old English decision of Lord Mansfield in Crepps v. Durden, 6 Cowper 640 (1777) also found that a baker who sold 4 "small hot loaves" on 4 separate occasions on the Lord's Day also did not creat 4 crimes, but just one.

The Eighth Circuit decision here passes the responsibility for regulating this anomalous situation from the Fifth Amendment to the Sentencing Guidelines. Judge Wollman says at p.8 of the Slip Opinion:

> "Protection from excessive punishment in this scenario lies in Section 5 G1.3 of the Sentencing Guidelines, which permits the district court to coordinate and approximate the sentences as if all the offenses had been brought in the same proceeding, rather than in the constitutional proscription against double jeopardy."

Can it be we want to require two trials or more, 800+, in several different Districts and use all of that judicial time we

don't have to allow the last judge in the last case to "approximate and coordinate" the sentences? On the civil side we don't allow split causes of action and have established a Multi-District Panel to coordinate voluminous repetitive cases. What simpler Constitutional result can one have than to require the United States to put all its eggs in one basket? Can we really afford the luxury of trying the same "scheme to defraud" as many times as we like, in as many different districts as we like? A cost-benefit ratio applied by most commercial business trial lawyers, would explode with the application of such logic. Imagine trying a case two or three times and getting a plaintiff's verdict for $100,000 three times but never collecting more than $100,000.

Common sense requires the application of the Double Jeapordy bar to the facts of this case. These two Petitioners have been punished enough. There is no substantial benefit to the Government if they are convicted again. Quaere, if they happen to walk?

The decision here is not reconcilable with this Court's early decisions in Nielsen and Snow. Applying the holding here to the old Mormon cases, each act of adultery or cohabitation would be a separate offense triable as a separate crime. If we applied this decision to the "4 small hot loaves" we would have 4 separate crimes. Coming forward to current

days, we can not possibly reconcile the holding in this case with that of this Court in either Halper or Kurth Ranch. Judge Wollman's opinion would clearly have found no double jeopardy bar in either case.

Surely with all the other work we have, if in only the Federal criminal cases, we have either double prosecution of the same facts which offend the law OR double punishment of the conviction for the same facts. The rule must be that the Constitutional prohibition is violated. In the first instance we merely dismiss the second case before it is tried. In the second instance, we technically have to do it by a habeas corpus proceeding after the punishment.

As to the mail fraud statute itself, if Congress wants 800+ counts, as irrational as that sounds, it should be the Judicial branch's application of the 5th Amendment which requires the 800+ counts to be brought at one time in one proceeding by application of the doctrine of Double Jeopardy. The Constitution still outranks the Congress as to Constitutional guarantees.

CONCLUSION

WHEREFORE, Edward L. Morris respectfully petitions this Court to enter its order granting Certiori to this Court to resolve the conflict in the opinions in this case as opposed to the outstanding earlier of opinions of this Court.

Respectfully submitted,

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65 F.3d 82

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3925

United States of America, *
*
Appellee, *
*
v. *
*
Steven M. Gardner, * Submitted: April 12, 1995
* Filed: August 28, 1995
Appellant. *
*
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*
No. 94-3927 *
*

Appeals from the United States District Court for the Eastern District of Missouri

United States of America, *
*
Appellee, *
*
v. *
*
Edward L. Morris, *
*
Appellant. *

Steven M. Gardner and Edward L. Morris appeal from the district court's [1] denial of their motions to dismiss on double jeopardy grounds an indictment alleging conspiracy to defraud and fraud. We affirm.

I.

In the mid-1980's, Germania Bank, a St. Louis area savings and loan association, began to suffer losses on its real estate loan portfolio. To increase its regulatory capital, Germania sought approval for a $10,000,000 public offering of uninsured, subordinated capital notes, commonly referred to as Schnotes, and a private offering of $7,500,000 of convertible subordinated debentures to Laclede Development Company.

Sales of the Schnotes began in October 1987, following governmental approval. By February 1988, approximately $8,500,000 worth of Schnotes had been sold, and on December 23, 1987, Laclede purchased $5,800,000 of the debentures. Germania's financial condition failed to improve, however, and in June 1990, Germania was placed in conservatorship by the Resolution Trust Corporation.

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[1] The Honorable Stephen M. Limbaugh, United States District Judge for the Eastern District of Missouri, adopting the Report and Recommendation of the Honorable Catherine D. Perry, then United States Magistrate Judge, now United States District Judge for the Eastern District of Missouri.

Gardner and Morris were indicted, along with Joseph Mason, by a federal grand jury in the Eastern District of Missouri on November 19, 1992. The indictment charges them with one count of conspiracy in violation of 18 U.S.C. Section 371, three counts of false entries in the books of a federally insured lending institution in violation of 18 U.S.C. Section 1006, one count of a false statement to a department or agency of the United States in violation of 18 U.S.C. Section 1001, and thirteen counts of mail fraud in violation of 18 U.S.C. Section 1341. All of the counts arose in connection with the operation of Germania Bank and the sale of the debt instruments. The indictment alleges that in connection with the proposed offerings, Morris, Gardner, Mason, and Jimmie W. New,[2] all officers of Germania, reviewed Germania's portfolio and decided not to book losses that would have required an addition of approximately nine million dollars in loan loss reserves and would have also required posting a loss for the third quarter of 1987, a consideration relevant to regulatory approval and important to the marketing of the Schnotes. The losses were also allegedly concealed from Germania's accountants and attorneys.

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[2] New pleaded guilty in both the Southern District of Illinois and the Eastern district of Missouri and testified for the government in the Illinois trial.

The same day on which the Missouri indictment was returned, Gardner and Morris were indicted by a federal grand jury in the Southern District of Illinois. The Illinois indictment alleged two counts of mail fraud in violation of 18 U.S.C. Section 1341 and one count of wire fraud in violation of 18 U.S.C. Section 1343, all arising out of the operation of Germania. The charges in both indictments relate generally to the intentional underfunding of Germania's loss loan reserves and the concealment of this fact from regulators and investors. The two indictments allege the same general course of fraudulent dealings in the same time frame and general geographic area, although the specific counts themselves are distinguishable.

At a hearing held in the Southern District of Illinois in Febraury 1993, Gardner and Morris sought transfer of the Illinois proceeding to Missouri under Fed. R. Crim. P. 21(b). The motion for transfer and subsequent motion for reconsideration were denied. Gardner and Morris were subsequently found guilty of the charges in Illinois in November 1993, and we.e sentenced to 46 months concurrent sentences on all counts and fines of $9,999 each. The judgments and sentences are currently on appeal in the Seventh Circuit. Following their convictions in Illinois, Gardner and Morris moved to dismiss the indictment in

Missouri on double jeopardy grounds, and it is from the denial of that motion that this appeal springs.

II.

"[T]he district court's denial of a motion to dismiss an indictment on the grounds of double jeopardy is reviewed de novo." United States v. Bennett, 44 F.3d 1364, 1368 (8th Cir.), cert. denied, 115 S. Ct. 2279, and cert. denied, 115 S. Ct. 2585 (1995). Once a defendant fashions a non-frivoulous double jeopardy claim, the government must show by a preponderance that the separate indictments charge separate offenses. Id.; see United States v. Okolie, 3 F.3d 287, 289 (8th Cir. 1993), cert. denied, 114 S. Ct. 1203 (1994).

Gardner and Morris both contend that the alleged scheme is one continuous course of conduct for which they cannot be subjected to multiple prosecutions. The Illinois counts deal with two specific instances of mail fraud on January 18 and February 7-8, 1988, as well as one count of various wire fraud offenses from January 14 through the end of February 1988. The Missouri counts allege a conspiracy that lasted from September 26, 1987, through July 26, 1988. The specific counts of false entries, mail fraud, and false statement in the Missouri indictment are also alleged to have taken place at various times within this time frame.

There can be no doubt that the charged offenses arise from the same set of circumstances and are predicated on the same-transactional theme, but that is not our guide in determining the implications of double jeopardy. See Garrett v. United States, 471 U.S. 773, 790 (1985) (rejecting same-transaction test). Rather, the inquiry runs to whether they constitute the "same offense" or require different factual predicates to conviction. Blockburger v. United States, 284 U.S. 299, 304 (1932). The conspiracy, false entry, and false statement counts are all plainly separate statutory offenses involving distinct elements, and thus do not pose any double jeopardy problem. See Dixon v. United States, 113 S. Ct. 2849, 2856 (1993). This holds true despite the fact that they arose out of the same course of conduct as the Illinois mail and wire fraud charges.

The mail fraud charges in the Missouri indictment likewise do not transgress the dictates of double jeopardy jurisprudence. "'The test is whether the individual acts are prohibited, or the course of action which they constitute.'" Blockburger, 284 U.S. at 302 (quoting Wharton's Criminal Law (11th Ed.) Section 34 n.3). If the individual acts are the target of the law, then separate indictments and prosecutions are permissible, even if the acts together constitute a common course of action. Id.; see Thomas v. Kerby, 44 F.3d 884, 887

(10th Cir. 1995) (where "the legislature provide[s] for multiple offenses under the circumstances, there is no premise for a double jeopardy claim").

So it is with the mail fraud statute. Under 18 U.S.C. Section 1341, it is not the plan or scheme that is punished, but rather each individual use of the mails in furtherance of that scheme. United States v. Calvert, 523 F.2d 895, 914 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Alanis, 945 F.2d 1032, 1036 (8th Cir. 1991), cert. denied, 509 U.S. 1045 (1992);United States v. Ledesma, 632 F.2d 670, 679 (7th Cir.), cert. denied, 449 U.S. 998 (1980); see Cochran v. United States, 41 F.2d 193, 197 (8th Cir. 1930) ("The use of the post office establishment in the execution of the alleged scheme to obtain money by false pretenses is the gist of the offense which the statute denounces, and not the scheme to defraud."). Accordingly, the separate instances of mailings in furtherance of the alleged fraud in connection with Germania are separately prosecutable despite the presence of only one general scheme. Cf. United States v. Easley, 927 F.2d 1442, 1451-52 (8th Cir.) (successive prosecutions involving mailings of obscene materials at different times are legally distinct), cert. denied, 502 U.S. 868 (1991); United States v. Gallardo, 915 F.2d 149, 151 (5th Cir. 1990) (per curiam) (multiple convictions for temporally indistinct mailings

of child pornography affirmed through comparison to mail fraud statute), cert. denied, 498 U.S. 1038 (1991). Further, the charges simply do not constitute the "same offense" because each charge of mail fraud "requires proof of an additional fact which the other does not," namely the use of the mails specified for each particular count. Blockburger, 284 U.S. at 304. Indeed, this case is paralleled by Ex parte Henry, 123 U.S. 372 (1887), in which the Supreme Court found no bar to a second indictment based on violations of the then-applicable mail fraud statute despite a previous conviction dealing with other transgressions of the statute. Id. at 373-74. The statute at that time limited the number of counts chargeable in an indictment arising from the same six month period, but another indictment alleging different counts from the same time frame was deemed permissible. See id. We are thus compelled to conclude that the Missouri prosecution of the separate mail fraud counts does not violate double jeopardy.

Gardner and Morris assert, however, that a fundamental problem exists with this reasoning as applied to their case because if additional charges were to be levied in connection with an allegedly singular scheme, they should have been so levied in the initial proceeding. These concerns are misplaced, for there is "no authority whatsoever" for the

proposition that the government must prosecute separate offenses together. Dixon, 113 S. Ct. at 2860; see Ex parte Henry, 123 U.S. at 374-75 (allowing multiple prosecutions when statute precluded alleging more counts in the initial indictment); see also Bennett, 44 F.3d at 1372 ("[I]f two offenses are not the same for purposes of barring multiple punishment, they necessarily will not be the same for purposes of barring successive prosecutions.") But cf. Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) (no later penalty allowed for the same offense). For the same reasons that the conpiracy, false statement, and other dissimilar charges need not be brought in the first proceeding, so, too, the Constitution does not require that aditional non-multiplicitous mail fraud charges be brought all in one proceeding.

III.

Gardner also asserts that the consideration of the other incidents of the overall criminal scheme for sentencing purposes in the Illinois case precludes the subsequent prosecution of and punishment for that conduct. The Supreme Court recently rejected this very argument in Witte v. United States, 115 S. Ct. 2199 (1995). "[W]here the legislature has authorized such a particular punishment range

for a given crime, the resulting sentence wihtin that range constitutes punishment only for the offense of conviction. . . ." Witte, 115 S. Ct. at 2208, see id. at 2205 (noting that a defendant "is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted"); see also Williams v. Oklahoma, 358 U.S. 576, 584-86 (1959). "[W]hile the Guidelines certainly envision that sentences for multiple offenses arising out of the same criminal activity ordinarily will be imposed together, they also explicitly contemplate the possibility of separate prosecutions involving the same or overlapping 'relevant conduct.'" Witte, 115 S. Ct. at 2208 (emphasis in original); see United States v. Bellrichard, No. 94-3439, slip op. at 10-11 (8th Cir. Aug. 8, 1995).

Gardner asserts that Witte is factually distinguishable from his case because he is charged with essentially the same course of conduct in both indictments, whereas in Witte the defendant engaged in two separate criminal ventures. Morris makes a similar argument in insisting that the conduct involved constitutes a single offense for purposes of the double jeopardy inquiry and the sentencing function. We conclude that our earlier discussion sufficiently rebuts these contentions, however, and we find Witte indistinguishable as it relates to these claims. Protection from excessive punishment in this

scenario lies in section 5G1.3 of the Sentencing Guidelines, which permits the district court to coordinate and approximate the sentences as if all the offenses had been brought in the same proceeding, rather than in the constitutional proscription against double jeopardy. See U.S.S.G. Section 5G1.3, comment. (nn. 2-3); Witte, 115 S. Ct. at 2208; see also United States v. O'Dell, 713 F.2d 421, 422 (8th Cir. 1983) (per curiam) (inviting district court to reconsider propriety of consecutive sentences for section 1341 offenses involving a single fraudulent scheme).

The judgment is affirmed.